



Proceed with caution on gun red-flag laws

August 30, 2019

After rampages in El Paso, Texas, Dayton, Ohio, and Gilroy, California, American policy makers have understandably looked for ways to stop future mass shootings. It's hard for them to achieve any form of consensus given vast philosophical differences over gun rights in particular. Most proposals run into immovable and oftentimes partisan political obstacles.

But there has been one relatively new idea that keeps getting traction among state and federal legislators and the public. That's the notion of passing "red-flag laws," or Extreme Risk Protection Orders, that allow law-enforcement officials to get a court order to seize guns from people they deem to be dangers to themselves and others.

Even many conservatives agree. NPR reported on a poll showing that "strong majorities of Americans from across the political spectrum support laws that allow family members or law enforcement to petition a judge to temporarily remove guns from a person who is seen to be a risk to themselves or others." Currently, 17 states, including California, have passed such laws – mostly in response to the 2018 shooting at a high school in Florida.

Of course, most everyone would like to remove weapons from dangerous people. But life rarely mimics movies such as "Minority Report," where police psychics predict future crime. The common-sense nature of red-flag laws has led to a rush to passage, with too little time spent evaluating their consequences or tailoring them to minimize real-world problems.

Red-flag measures inevitably spark due-process concerns. People often say or do odd things – or post them on social media – that pose no real dangers, but might grab the attention of friends, neighbors or police. "Possible risk" is hard to define in a law.

"Given the imagined stakes, judges tend to err on the side of granting orders that bar people from possessing guns," wrote Jacob Sullum in Reason. No one wants to be the judge who denied a gun-seizure order – only to have that person later commit a gun-related crime.

The burden of proof for seizure is low, especially given that a constitutionally protected right is in the balance. Red-flag laws can "empower hostile neighbors, estranged spouses and gunophobic busybodies to harass gun owners," argued CALmatters' Dan Walters. Some states allow only police agencies to seek gun removal, but others allow petitions from medical professionals, relatives, friends and others.

California's Armed Prohibited Persons System is a similar idea that should offer caution for red-flag supporters. The state may confiscate guns from people no longer deemed eligible to own them because of a mental-health situation or restraining order. But analysts have found the confiscation database to be highly inaccurate, meaning the program has wrongly deprived many citizens of gun-ownership rights in exchange for unclear benefits.

Likewise, David Kopel, a scholar with the libertarian Cato Institute, testified in the U.S. Senate in March that "about a third of gun confiscation orders (under red-flag laws) are wrongly issued against innocent people."

Are red-flag laws providing safety or an illusion of safety? Are they routinely depriving Americans of their constitutional rights in the process? We're not saying such laws – or the expansion of existing ones – should be rejected out of hand. But these questions need to be answered first. Just because an idea is bipartisan and politically feasible doesn't make it ideal.